

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

Orig.

76-6009

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MARCELINA DIAZ RIVERA DE GOMEZ,

Appellant-Plaintiff,

-v-

HENRY A. KISSINGER, Secretary of
State of the United States, et al,

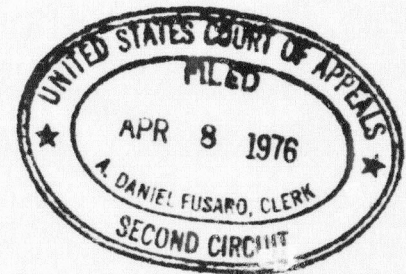
Appellees-Defendants.

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Appeal No.
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76-6009
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APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS
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MARCELINA DIAZ RIVERA DE GOMEZ, :
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Appellee-Defendants. :
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APPELLANT'S REPLY BRIEF

POINT I. None of the cases discussed by the
Government directly deal with Section 279
jurisdiction.

Burrafato v. United States Department of State,
523 F.2d 554 (1974) is readily distinguishable from the
case at bar. Burrafato had come illegally to the United
States and was found not to have standing in the federal
courts to require the Department of State to follow its
own regulations id. @557.

Here Gomez-Tejada, the husband of appellant-
plaintiff, did not come illegally to the United States but

has been patiently awaiting for a visa appointment in Santo Domingo, Dominican Republic. At his one and only visa appointment and interview he was not given an opportunity to rebut, in Santo Domingo, Dominican Republic the allegedly derogatory information developed by the Consul. Instead, plaintiff citizen spouse was required to produce, in New York, evidence in rebuttal of witnesses located by the adverse consular agent, who are in the Dominican Republic.

Thus, the Court may require the District Court to look into this prima facie arbitrary and capricious procedure and examine the Regulations of the defendant.

POINT II. Mandel v. Kleindienst, 408 U.S. 753
does not discuss the basis of jurisdiction
of the Court of First Instance.

The opinion of the three-judge District Court in Mandel, 325 F. Supp. 620 (E.D.N.Y. 1971) did not discuss the basis of its jurisdiction, presumably because that question was neither presented, nor briefed. When the case reached the Supreme Court, "probable appellate jurisdiction" was noted, 404 U.S. 1013 (1972) but the opinion itself did not discuss the basis of the District Court's jurisdiction.

The Supreme Court defined the "narrow issue as follows:

"The case, therefore, comes down to the narrow issue whether the First Amendment confers upon the appellee professors, because they wish to hear, speak, and debate with Mandel in person, the ability to determine that Mandel should be permitted to enter the country or, in other words, to compel the Attorney General to allow Mandel's admission."

408 U.S. @762. Thus, it may be inferred that jurisdiction rested upon Article III, Section 1 of the Constitution of the United States since the only issue was the First Amendment rights to American scholars.

It is a cardinal principle of judicial construction that Federal cases that do not discuss their jurisdictional basis will not be followed.

The case at hand does not involve anyone's First Amendment rights. It does involve Section 279 of the Act and the implementation of regulations issued under the authority of Sec. 201(b) and 221(g) by administrative agencies. Section 279 is clear as crystal.

POINT III. Section 279 jurisdiction was sustained in Faillo v. Levi, 406 F. Supp. 162 (1975).

The first reference since the 1952 Immigration and Nationality Act and its amendments to Section 279

jurisdiction was made by a three-judge statutory court in Fiallo v. Levi, supra. Speaking for the court, Judge Moore said:

Subject matter jurisdiction is conferred on this Court by Section 279 of the Act, Title 8 U.S.C. §1329.

A threshold question is presented with regard to Fiallo's standing to maintain this action. The administrative decision on which Fiallo bases this suit is the denial of his petition by the United States Consul at Santo Domingo. Decisions of consuls granting or denying a visa have been held to be immune from judicial review. See, i. g., Loza-Bedoya v. INS, 410 F.2d 343 (9th Circ.1969). We note, however, that the petition in question here did not constitute an application for a visa, but was a preliminary declaration of immigrant status. We will not extend consular non-reviewability, insofar as that rule has been recognized, beyond the actual grant or denial of a visa. This is predicated upon our reluctance to insulate entirely the actions of any public official from judicial scrutiny, and thereby foreclose a group of plaintiffs from seeking relief in the courts. Plaintiff Fiallo, therefore, is not barred from bringing this action. (emphasis supplied.)

The facts in the case at bar fit the pattern of this ruling. Gomez-Tejada never made, and hence was not refused, an immigration visa. Thus this Court is not called upon to review the legal effect of an official act that never took place. The only official act that

did take place at the Consulate in Santo Domingo was the ex-parte investigation regarding Gomez-Tejada's life the results of which plaintiff, his wife, was required to rebut in New York, and which Gomez-Tejada was never given the opportunity to rebut.

POINT IV. Since the complaint was dismissed, this Court must take its allegations as true.

The defendants' brief makes much of an alleged factual situation which was not found by the Court below. It is elementary that where a complaint has been dismissed without trial, its allegations must be taken as true by an appellate Court. Rule 12, F.R. Civ. P.

POINT V. The purported revocation of the visa petition during the pendency of the judicial proceedings was ultra vires.

The defendants seek to confuse the argument by injecting the issue of the alleged revocation of plaintiff's visa petition.

The fact is that the defendants' motion for summary judgment came on for decision by the District Court without the defendants' making any effort to supplement the record. Since plaintiff was challenged

to answer defendants' motion, there was no way, at that point in time, to amend the complaint. The defendants attempt to abort the issues by instituting questionable administrative procedures.

Orderly procedure mandates that only one motion be pending at any one time in any cause, and this was disregarded by the defendants. Faced with the defendants' motion for summary judgment, the District Court was under the impression that all administrative remedies had been exhausted, which they were, but for the fact the record does not reflect this, because all pre-visa petition to classify an immediate relative.

Respectfully submitted:



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